IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 7 OF 1991

The Commissioner of Income-tax,)
Bombay City-XIV, Bombay.) ...Applicant

V/s.

Devshi Trust,)
C/o. M/s.Pipe Sales Corpn.)
Magazine street, Darukhana,)
Bombay - 10.) ...Respondent

Mr.Ashok Katangale, Sr.Counsel i/b. K.C. Sidhwa for Applicant.
None for Respondent.

CORAM : V.C. DAGA AND
A.S. AGUIAR, JJ.

DATED : JULY 12, 2005.

ORAL JUDGMENT (PER V.C. DAGA, J.) :-

. This is the reference under Section 256(1) of the Income Tax Act made by the Income Tax Appellate Tribunal ('The Tribunal' for short). The question referred by the Tribunal is arising out of its order passed in ITA No.3053(Bom) of 1985 for the Assessment Year 1982-83. The same reads as under :-

"Whether, on the facts and in the circumstances of the case, the assessee-Trust was a

non-discretionary Trust for the purposes of applicability of appropriate rate of tax ?"

2. The factual matrix reveal that the respondent (assessee) was assessed in the status of A.C.P. On 25th May, 1979, one Pushpa F. Shah created a Trust by handing over Rs.5000/- to two trustees viz. Shri Bipin Amritlal Kothari and Smt.Bharati Bipin Kothari in the presence of one Shri Hasmukhlal Panachand Sheth. It may be mentioned that Pushpa F. Shah is a sister of Shri Bipin, while Smt.Bharati is a wife of Bipin A. Kothari

3. On 25th May, 1979, each of the two trustees and the witnesses sworn the affidavit wherein they have given full details as to the purpose of the trust, powers of the trustees, the name of the beneficiaries, etc.

4. Exercising the powers given to the trustees, the Board of the Trustees passed the resolution on 28th June, 1980 resolving to pay a sum of Rs.20,000/- to the beneficiaries in the ratio of 50 : 50. They have

resolved that the income of the trust and the balance in Surplus Reserve Fund after paying the amount as mentioned hereinabove be held on behalf of the beneficiaries viz. Ms.Sonal Bipin Kothari and Master Amit Bipin Kothari in the ratio of 50 : 50. On the aforesaid fact, the assessee filed its return on income for the year under reference computing the taxable income as nil in the manner mentioned in the Return of Income.

5. ITO framed assessment under Section 143(3) read with Section 164 of the Act on 24th August, 1984, wherein he had brought to tax the income of the assessee at maximum marginal rate of tax holding that the share of the beneficiaries was not definite and ascertainable as on the date when the trust came into being, as such act of trustees can not subsequently, change or alter it. In other words, the trust was assessed as discretionary trust and the income of the trust was brought to tax on maximum marginal rate of taxation as provided under Section 164 of the Income Tax Act.

6. Being aggrieved by the aforesaid order of the ITO, assessee preferred an appeal before the Appellate Assistant Commissioner ('AAC' for short), who was pleased to allow the appeal filed by the assessee. Accepting the contention of the assessee, the Revenue being aggrieved by the aforesaid order of the AAC, carried the matter in appeal before the Tribunal. For the reasons recorded for the year under reference, the Tribunal upheld the order of the AAC.

7. Having dissatisfied with the decision of the Tribunal, the Revenue desired the Tribunal to refer the question of law for the opinion of this Court extracted from the opening part of this order.

8. Having heard learned Counsel appearing for the Revenue and having perused the finding recorded by both the authorities below and the material available on record, resolutions adopted by the trustees and the demarcation of shares made by them in favour of the beneficiaries in the ratio of 50 : 50 as indicated hereinabove, clearly indicates that the power vested in

the trustees, the Board of Trustees were exercised by them in their meeting held on 28th June, 1980 wherein the shares of the beneficiaries were defined though initially the trust was discretionary trust i.e. upto 31st March, 1980. But after having defined the specific shares of each beneficiary, the definite trust came into existence. In that view of the matter, the view taken by the Tribunal is in consonance with the evidence available on record.

9. In this view of the matter, the trust has to be held to be a non-discretionary trust. If that be so, the question referred has to be answered in affirmative i.e. in favour of assessee and against the revenue. (See **Commissioner of Income Tax V/s. Trustees of Trust of Mrs.Manorama L. Apte Trust for their relatives (2002) 178 CTR 231.)**

10. Reference, accordingly, stands disposed of with no order as to costs.

(A.S. AGUIAR, J.) **(V.C. DAGA, J.)**